

**San Diego County Association for the Retarded and
Aiko Hinojosa. Case 21-CA-19138**

January 13, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On August 17, 1981, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, both the Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs¹ and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order, as modified herein.⁴

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, San Diego County Association for the Retarded, San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

"(a) Disciplining its employees for engaging in a strike for the purpose of securing satisfactory resolution of their work-related grievances.

¹ The Respondent's request for oral argument is denied because, in our opinion, the record, exceptions, and briefs adequately set forth the issues and positions of the parties.

² The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

³ In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

⁴ We find the Respondent's unlawful conduct in discharging eight employees for engaging in a strike is so egregious as to demonstrate a disregard for its employees' fundamental statutory rights. We find it necessary, therefore, to order the Respondent to cease and desist from "in any other manner" interfering with, restraining, or coercing employees in the exercise of their protected Section 7 rights. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

"(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraphs 2(a) and (b) and reletter the subsequent paragraphs accordingly:

"(a) Offer Robert Acosta, James Dunkin, David Gilmore, Aiko Hinojosa, Karen Peckell, Therese Sullivan, Genevieve West, and Warren Werwage immediate reinstatement to their former positions, if necessary terminating their replacements, or, if such positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings resulting from the discrimination practiced against them, in the manner described in 'The Remedy' section of this Decision."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge you for engaging in a strike for the purpose of causing us to favorably resolve your work-related grievances (grievances over your rates of pay, wages, hours, or working conditions).

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Acosta, James Dunkin, David Gilmore, Aiko Hinojosa, Karen Pickell, Therese Sullivan, Genevieve West, and Warren Werwage reinstatement to their former positions, if necessary terminating their replacements, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage whole for any losses in wages or benefits they suffered by virtue of our discharging

them for engaging in a strike to cause us to favorably resolve their work-related grievances, with interest.

SAN DIEGO COUNTY ASSOCIATION FOR THE RETARDED

DECISION

GEORGE CHRISTENSEN, Administrative Law Judge: On November 24-25, 1980,¹ I conducted a hearing at San Diego, California, to try issues raised by a complaint issued on July 18 and amended on August 7, based upon a charge filed on June 9 and amended on July 17.

The amended complaint alleges that San Diego County Association for the Retarded (herein called Association) violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), by discharging eight employees because they engaged in protected concerted activities for the purpose of collective bargaining or other mutual aid and protection.

The Association concedes it discharged the eight, but contends that the jurisdiction of the National Labor Relations Board either does not or should not be extended to its operations and denies the eight employees were discharged for engaging in activities protected by the Act, asserting the eight were discharged for engaging in unlawful, unprotected activities.

The issues are whether the Board has jurisdiction over the Association; if so, whether it should exercise that jurisdiction; and if so, whether the eight discharges were violative of the Act.

The parties appeared by counsel at the hearing and were afforded full opportunity to adduce evidence, to examine and cross-examine witnesses, to argue, and to file briefs. Briefs were filed by the General Counsel and the Association.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs, analysis and research, I enter the following:

FINDINGS OF FACT

I. JURISDICTION

The amended complaint alleges, the answer admits, and I find at all pertinent times the Association was a nonprofit California corporation engaged in the business of educating and training mentally retarded children and adults; that it operated four facilities in San Diego County, California, including a facility known as the Arrow Center (herein called the Center) at 3035 G Street, San Diego, California; and that during the year 1979 it received gross revenues in excess of \$250,000 from its operations, grants in excess of \$5,000 from the United States Department of Labor, and purchased and received goods and products from outside California valued in excess of \$5,000.

On the basis of the foregoing, I find and conclude that at all pertinent times the Association was an employer engaged in commerce in a business affecting commerce

within the meaning of Section 2 of the Act. I further find and conclude, in view of the nature, substantiality, and scope of the acts alleged in the complaint as violative of the Act and their actual or potential effect on interstate commerce, it effectuates the purposes of the Act to exercise jurisdiction in this case.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Center's Operations

At times pertinent the Center employed approximately 20 teachers or instructors and aides in its activities department and 12 supervisors, instructors, and aides in its workshops department for the purpose of training and instructing about 185 students ranging between 22 and 60 years of age, with IQ's of between 20 through 70, with most students at the lower end of that range. Charles E. Covell was the director of the Center and in overall charge of its operations. Directly under Covell and in charge of the activities department was Dorothy Cummings, activities supervisor.²

Included among the teachers or instructors and aides in activities in late April were Robert Acosta, James Dunkin, Julie Fish, David Gilmore, Maureen Hillman, Aiko Hinojosa, Karen Pickell, Ruri Pierre, Therese Sullivan, Genvieve West, and Warren Werwage.³

B. The Concerted Activities and the Discharges

In late April, Hinojosa was teaching a class of approximately 20 students in Basic Education II, assisted by two aides. Several days prior to Friday, April 25, Covell gave his written approval to Hinojosa's proposal for her and another class to take a field trip to the zoo on April 25. Following that approval, Hinojosa informed her class of the scheduled trip and they discussed what they would see and do during the trip.

About 2 p.m. on April 24, Cummings informed Hinojosa that the field trip was canceled since Covell, forgetting it had been scheduled, granted the schoolbus driver's request for a day off on April 25. Hinojosa protested the cancellation, stating Covell already approved the trip and it was up to the administration to find another driver. Cummings replied there was another person qualified to drive the bus employed in the workshops and stated she would check into the possibility of assigning that person to drive the bus on April 25.

Hinojosa discussed the problem with another activities department employee, Ruri Pierre, and Pierre stated she could and would be willing to drive the bus, since she had done so on several previous occasions when it was necessary to transport students between the Center and various destinations.

When Hinojosa checked back with Cummings over the scheduled trip, Cummings informed her the trip still was off, she had not been able to make the necessary ar-

¹ I find at all pertinent times Covell and Cummings were supervisors and agents of the Association acting on its behalf within the meaning of Sec. 2 of the Act.

² Teachers and aides from the California school system also worked at the Center; the employees named above were full-time Association employees at the Center.

³ Read 1980 after all further date references omitting the year.

rangements. Hinojosa suggested she contact Pierre, since Pierre could and would drive. Cummings told Hinojosa to forget about it, "the front office is in a bad mood."

By the time Hinojosa had Cummings' final word, most of her class had gone home (at approximately 3:15 p.m.). Pierre and Gilmore joined Hinojosa in her classroom and Hinojosa voiced her frustration over her inability to proceed with the trip, the disappointment she anticipated among her students the following day, particularly since she had not been able to inform them of the cancellation before they left the Center that day, and her anger at the administration's handling of the matter. Gilmore stated he would talk to Covell. He left the other two, returned a short time later, and informed them that while he caught Covell in the parking lot, Covell proceeded to his car and drove off, refusing to discuss the matter, which angered Gilmore.

The three discussed the entire matter, their dissatisfaction with that and other administration actions, and decided to gather their associates. Within a short time Acosta, Dunkin, Fish, Hillman, Pickell, Sullivan, West, and Werwage arrived. Hinojosa, Gilmore, and Pierre informed them what happened. In the ensuing discussion, various staff members recounted grievances and complaints they had against the administration. The group finally agreed Fish would prepare a list of their grievances from notes she and Pickell took during the course of the meeting;⁴ that Fish and Pierre⁵ would present their grievances to Covell the following morning at the regular Friday morning staff meeting;⁶ and that all those present other than Fish and Pierre would withhold their services beginning the following morning at 8 a.m. and gather instead at Pickell's home to demonstrate their solidarity and impress Covell with the seriousness of their grievances and the necessity to resolve those grievances in a manner satisfactory to the grievants.⁷ It was also agreed that Fish or Pierre would telephone the assembled group at Pickell's home the following morning and advise them of Covell's reaction to the presentation of their grievances. The group did not consider or decide what they would do if the reaction was unsatisfactory.

By shortly after 8 a.m. on Friday, April 25, Covell and Cummings were aware that almost the entire activities staff were withholding their services that day, since most of the absentees telephoned the Center, spoke either to

Covell or Cummings, and stated they would not be in (with some stating they were sick). When Cummings secured their time records to note the absences, she discovered they already were marked absent (with some marked "sick"), advised Covell of the markings, and observed the records must have been marked the previous day.⁸

When Covell and Cummings arrived for the staff meeting, Covell commented it looked like most of the activities staff were withholding their services to express their anger over the reduction scheduled for that day in the number of their assistants.⁹ Pierre responded that was not the reason the activities staff was withholding their services that day, that she and Fish had been asked by the staff to present their reasons, and requested a meeting. Covell assented and he, Cummings, Fish, Pierre, Donna Rosenberg, and Muriel Collins proceeded to Cummings' office.¹⁰ While the ensuing discussion was under way, Hillman arrived and joined the conference.¹¹ The conference began about 8:30 a.m. Fish followed the procedure of reading off a grievance from her list, adding her comments, soliciting the comments and views of the others present on the subject matter of that grievance, responding to those comments, etc. Both Fish and Covell were tense and at times spoke in raised voices. Fish was only part way through the list when Covell, noting the time and the presence of a large number of students on the grounds, stated it was getting close to starting time, he was going to have to cover the classes and workshops, and the meeting would have to continue at some other time.¹² At that time Fish advised Covell she could summon the strikers by telephone. Covell requested she do so, suggesting that the discussion of the grievances and complaints resume at a noon staff meeting. Pierre went to the telephone while Fish and Covell continued their discussion of the grievance before them. When Pickell answered the telephone, and while she and Pierre exchanged greetings, Pickell heard raised voices in the background; Pickell asked Pierre how it was going and Pierre responded it was not going well and advised Pickell to tell the group to come in to work. Pickell replied she would relay Pierre's advice to the group.

Following completion of Pierre's call, the Covell-Fish conference terminated and the participants went to their respective classrooms, workshops, and other duties.

⁴ The notes included the following grievances: (1) cancellation of the April 25 field trip and management refusal to discuss the cancellation; (2) understaffing; (3) too heavy a workload; (4) inconsistency in pay scales; (5) overtime payments scheduling; (6) failure of management to communicate with staff re alleged budgetary limitations; (7) failure of management generally to communicate with staff re problems and attempt to resolve them; (8) providing the services of a nurse; etc.

⁵ In an election conducted by Covell and Cummings the previous year, Fish was elected "staff representative" and Pierre was elected as her alternate. Fish and representatives similarly elected from the other three facilities operated by the Association met periodically with representatives of the executive director of the Association to discuss personnel and related problems.

⁶ Covell regularly conducted a staff meeting each Friday morning between 8 and 8:45; the staff was scheduled to report for work at 8; the students arrived at the Center between 8:30 and 9; classes and workshops commenced at 9.

⁷ Fish opposed this decision, favoring attendance of the entire group at the staff meeting the following morning and a presentation of the grievances at that time, but was overruled.

⁸ Cummings was correct; Dunkin procured the time records of the group during the meeting the previous day, distributed them to the group, each member marked himself or herself absent for April 25 and in some cases inserted "sick" as the reason; and Dunkin returned the records to the office.

⁹ Personnel from the adult education division of the California schools regularly assisted the staff in educating and training the students; their numbers were reduced on April 25.

¹⁰ Rosenberg and Collins were on the workshops staff. Rosenberg was Fish's predecessor as elected staff representative and Fish thought the familiarity of the two with several of the matters set out in the grievances and their input at the conference would be helpful.

¹¹ While Hillman agreed to join the other members of the activities staff in withholding her services on April 25 and to join the others at Pickell's home that day, she changed her mind overnight and decided to report for and go to work.

¹² By doubling classes and assigning workshops staff to cover some of the classes in activities, all classes and workshops were manned without incident and without bringing in additional personnel.

By 10 a.m. the absentee activities staff had not come in. Both Covell and Cummings asked Fish why they were not in, Covell stating if they were not in by noon, action could be taken against them, including discharge.¹³ Fish telephoned Pickell and asked why the staff had not come in, stating that their absence was putting her in a bad position, that Covell was going to take action against them (including possible discharge) if they were not in by noon, though everything was under control (all classes and workshops covered). Pickell's reply was evasive; she told Fish not to worry, the strikers were discussing strategy.

Following that conversation, Fish realized that the absentees no longer trusted or were willing to follow her lead; she subsequently advised Cummings she resigned as staff representative.

The strikers decided after prolonged discussions concerning the telephone calls and their position that, since they risked discipline whether or not they reported for work, they would continue on strike for the entire day, go in as a group their next scheduled workday (Monday, April 28), and demand Covell meet with them as a group and resolve their grievances prior to any return to work.

When Covell made contact with Farmer (on Saturday, April 26), Farmer gave Covell carte blanche concerning Association action against the employees who engaged in the Friday strike. Covell decided to discharge all the employees who engaged in the strike because, as he put it, "leaving the whole day without coming in and basically for—to get some attention for me to listen to some grievances, was not a valid thing."

The strikers never had an opportunity to present and attempt to resolve their grievances. When they arrived at the Center on April 28, they were instructed to report to Room 14. Prior to proceeding to that room, Fish notified the strikers she no longer could speak for them for she had resigned as staff representative. Fish and Pierre accompanied the strikers to Room 14, where Covell read a prepared statement wherein he accused the strikers of irresponsible conduct, stated he was deeply disturbed over their action, stated the staff manual set out a chain of command and procedures for the processing of grievances,¹⁴ addressed some of the grievances on the list Fish gave him the preceding Friday,¹⁵ and stated since the

strikers chose strike action against the Association to pressure him into resolving their grievances to their satisfaction rather than reporting for work and processing their grievances through Cummings, etc., they were discharged. He closed with a direction to turn in all keys and other Association property, to gather all personal property, to be off the premises by 9 a.m., and not to reenter the premises unless and until they made an appointment with him. At the close of his statement, Pierre announced that, since she was part of the strike group and fully supported the strike, she resigned. Following the discharges and the resignation, only Fish, Hillman, and Jan Gilbert continued to work in the activities department.¹⁶

At a subsequent (May 1) meeting sought by the eight discharged and one resigned employee with Farmer¹⁷ for the purpose of requesting reinstatement, Farmer not only rejected the request, he informed the nine they were finished in the field (educating and training the handicapped) within the area, since he had contacts with "everybody" and "word gets around fast."¹⁸

C. Analysis and Conclusions

When two or more employees withhold their services (strike) for the purpose of pressuring their employer into resolving to their satisfaction grievances over their rates of pay, wages, hours, or working conditions, they engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7 of the Act and it is an unfair labor practice within the meaning of Section 8(a)(1) of the Act for their employer "to interfere with, restrain, or coerce" (discharge) them for so engaging.¹⁹

The Association argues its discharge of the eight strikers did not violate the Act because: (1) they did not go on strike over work-related grievances; (2) their strike did not further any interest they had in resolving work-

conditions—that the four centers were budgeting for one-fourth of a nurse apiece so a nurse's services could be provided for the four centers—that he was trying to secure budget increases to alleviate their complaints over the constant increases in the number of students without corresponding increases in staff to handle them—that the executive director was seeking wages more comparable to the norm, the institution of a retirement plan and better health and dental plans—and that he would in the future make more of an effort to counsel with the staff and to resolve their grievances.

¹⁶ Gilbert did not attend the employee grievance meeting of April 24 but did join the group at Pickell's home on April 25 and joined in their decision that day to remain on strike all day; Covell was unaware of the latter and stated at the hearing that he intended to confront Gilbert, ask her directly about the extent of her support of the strike, and, depending on her answer, decide what action was appropriate.

¹⁷ I find at all pertinent times that Farmer was a supervisor and agent of the Association acting on its behalf within the meaning of Sec. 2 of the Act.

¹⁸ The findings in this sec. B are based upon documentation and the testimony of Collins, Covell, Cummings, Fish, Hillman, Hinojosa, Pickell, and Pierre with any conflicts between the testimony of Hinojosa, Pickell, and Pierre and that of the other witnesses resolved by crediting the testimony of Hinojosa, Pickell, and Pierre, since their testimony was the more plausible, sincere, and creditable in the conflicting areas.

¹⁹ *N.L.R.B. v. Washington Aluminum Co., Inc.*, 370 U.S. 9 (1962); *N.L.R.B. v. Robertson Industries*, 560 F.2d 396 (9th Cir. 1976); *Shelly & Anderson Furniture Manufacturing Co., Inc. v. N.L.R.B.*, 497 F.2d 1200 (9th Cir. 1974); *First National Bank of Omaha v. N.L.R.B.*, 413 F.2d 921 (8th Cir. 1969).

¹³ Covell testified that the Association's executive director, Richard B. Farmer, had to authorize any disciplinary action before it could be effected and Farmer was out of town on April 25; he therefore had to defer taking any action until he contacted Farmer with his report and recommendations and secured Farmer's decision on what action would be taken.

¹⁴ Referring to a provision of the manual stating, "If you have any questions, complaints or problems about your work or position with DWCAR, your point of view and the facts will be fairly and reasonably considered. You should first discuss the matter with your immediate supervisor (Cummings), you may then request a conference with the area director (Covell). . . . If the problem is not resolved to the satisfaction of the employee, he may request action from the Personnel Practices Committee. If still not resolved, action may be requested from the Board of Directors."

¹⁵ Fish was requested to and surrendered the list of grievances before reporting to her assigned class on April 25. Covell, referring to the list, stated that the board was considering granting substantial pay raises—that he had requested budget increases to supply many items sought by the strikers—that he and the board were trying to secure more classroom space and money to improve present classrooms and relieve overcrowded

related grievances; (3) they were not seeking a specific remedy or result by virtue of their strike; and (4) their strike was unlawful, and/or improper and/or indefensible.

Findings have been entered that on April 24 the eight (plus Fish, Pierre, and Hillman) met after work on April 24 and developed a number of grievances for presentation to Covell the following morning at 8 a.m. Those grievances involved wages (inconsistent pay scales), hours (overtime payment, scheduling), and working conditions (understaffing; too heavy a workload; failure to advise re alleged budgetary limitations; failure to communicate with staff re problems and attempt to resolve them; arbitrary cancellation of a field trip and refusal to discuss reasons therefor; etc.).

I find the foregoing were work-related grievances.

The Association contends, assuming the above-recited matters were work-related grievances, that the strikers did not go on strike at 8 a.m. on April 25 to cause Covell to resolve those grievances to their satisfaction, but rather for the limited purpose of securing Covell's attention.

I reject the argument; certainly the strikers decided on April 24 to commence a strike on April 25 at 8 a.m. to secure his attention; but also to cause Covell to resolve those grievances to their satisfaction. I therefore find and conclude that the strikers went on strike at 8 a.m. to cause Covell to resolve their work-related grievances in a manner satisfactory to them; i.e., to further their interests *vis-a-vis* those grievances.

The Association next argues that, even if the strikers went on strike for the purpose of causing Covell to resolve work-related grievances to their satisfaction, from the time Covell stated his willingness to meet and discuss the grievances with them, their objective was accomplished and the strike thereafter became an individual decision by each striker to remain off work rather than risk discharge for making a false statement of his or her reason for withholding service (by calling in sick or placing the word "sick" on a time record) or for unauthorized absence (in view of Covell's comment that any employee who failed to report for work by noon risked discipline, including possible discharge), and thus was unprotected after that time.

I reject this contention. Findings have been entered that on April 24 the strikers agreed to go on strike at 8 a.m. on April 25, and to continue on strike until they received a report on Covell's reaction to the presentation of their grievances, without considering or deciding what they would do following receipt of that report; and that, after they received that report, they decided to continue on strike the balance of April 25 and until they learned Covell's reaction to their appearance en masse at the Center at 8 a.m. and demand for his consideration and resolution of their grievances in a manner satisfactory to them (a demand they never had the opportunity to make). It is undisputed that the strikers at their April 25 meeting discussed the fact that a number of them called in sick and marked their timecards as sick, that the appearance of those strikers at the Center that day would constitute an admission they were not ill, and that Covell might discipline them on that basis, but it is equally un-

disputed that other strikers did not call in sick nor mark themselves as sick and Covell was well aware they were out on strike and not sick,²⁰ and that, after such discussion, the strikers *decided as a group* to remain on strike at least until they heard Covell's April 28 response to their demand for resolution of their grievances.

On the basis of the foregoing, I find that all times on April the eight discharged employees were engaged in a strike for the purpose of causing the Association to resolve work-related grievances to their satisfaction.

In view of the foregoing, I find that the eight were seeking a remedy for their grievances of sufficient specificity within the meaning of the cases recited above (see fn. 19, particularly *Shelly*, where a strike for the purpose of causing the employer to negotiate earnestly was considered sufficient purpose for the strike).

Lastly, the Association contends that, even if the eight discharged employees went on strike for the purpose of achieving satisfactory resolution of work-related grievances, their conduct nevertheless was unprotected within the meaning of Sections 7 and 8(a)(1) of the Act because it was unlawful, and/or improper, and/or indefensible—arguing that alleged falsification of timecards, and/or failure to resort to established procedures for grievance resolution instead of striking, and/or alleged exposure of students and staff to "dangerous conditions" constituted such unlawful, and/or improper, and/or indefensible conduct.

The obvious answer to the first contention is that Covell did not discharge any of the eight for alleged falsification of a timecard. Both in his April 28 oral discharge notice and his accompanying written termination notices, Covell gave only one reason for discharge—seeking to resolve grievances through strike action rather than through established grievance procedures. It is further evident that not all of the eight employees discharged marked "sick" on their timecards (or called in "sick"). On the basis of the foregoing, I find and conclude that the entry by some of the eight of the word "sick" on their timecards (or calling in "sick") is irrelevant, since that entry and notice was not the reason for their discharge. I further find and conclude, in any event, that the entries and calls are insufficient basis for finding that those discharged employees who reported that their April 25 absences on strike were occasioned by illness thereby engaged in concerted activities unprotected by Section 7 and 8(a)(1) of the Act.

With regard to the election by the strikers to go on strike against the Association in an attempt to secure satisfactory resolution of their grievances rather than resorting to the procedure set out in the staff manual for the resolution of grievances, I find no authority for the premise that such election denies strikers the protections afforded by the Act; in fact, there is authority to the contrary.²¹ A contrary holding would make a travesty of

²⁰ Covell termed the strike a "sickout" when Cummings pointed out how some of the strikers marked their timecards at 8 a.m. on April 25 and stated at the opening of the April 25 staff meeting that most of the activities staff apparently were on strike because of their dissatisfaction at the loss of services of personnel from Adult Education that day.

²¹ See *Washington Aluminum, supra*, holding the existence of a rule prohibiting absences without permission without effect, and *First National*
Continued

the protections afforded by Sections 7 and 8 of the Act, for an employer by the device of unilaterally establishing a procedure for the processing of employee grievances could effectively bar employees from resorting to direct economic action for their satisfactory resolution, a right guaranteed by the Act. I also note the procedure is *permissive*, not mandatory. I therefore find that, by engaging in direct, economic action to achieve a satisfactory resolution of their grievances rather than resorting to the grievance procedure unilaterally established by the Association for permissive resort thereto, the eight discharged employees did not engage in illegal, improper, or indefensible conduct depriving them of the protections afforded by Sections 7 and 8(a)(1) of the Act.

The Association next contends that, by engaging in the April 25 strike, the eight discharged employees subject the students and staff at the Center to "dangerous conditions" and thus removed themselves from the protection of the Act.

It is undisputed that all classes and workshops were manned by instructors or aides previously scheduled for work on April 25, without incident, and without calling in additional help. Thus, the short answer to this contention is that it is speculative without proof that the strikers created "dangerous conditions" by their absence, and proof that similar staff shortages in the past produced "dangerous conditions." I therefore find that the Association failed to establish that the eight striking employees subjected the students and staff to "dangerous conditions" warranting a finding that by striking against the Association on April 25 in an effort to secure satisfactory resolution of their work-related grievances they engaged in conduct unprotected by Sections 7 and 8 of the Act.

On the basis of the factual findings, analysis, and conclusions set out above, I find and conclude that on April 28 the Association violated Section 8(a)(1) of the Act by discharging Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage for engaging in a strike on April 25 for the purpose of causing the Association to resolve their work-related grievances in a manner satisfactory to them.

CONCLUSIONS OF LAW

1. At all pertinent times the Association was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

2. At all pertinent times Farmer, Covell, and Cummings were supervisors and agents of the Association acting on its behalf within the meaning of Section 2 of the Act.

3. The Association violated Section 8(a)(1) of the Act by discharging Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage for engaging in a strike for the purpose of causing the Association to resolve their work-related grievances in a manner satisfactory to them.

4. The aforesaid unfair labor practice affected commerce as defined in Section 2 of the Act.

Bank of Omaha, supra, holding the grievants had no duty to refrain from striking while giving their employer an opportunity to resolve their grievances.

THE REMEDY

Having found that the Association engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, I recommend that the Association be directed to cease and desist therefrom and to take affirmative action designed to effectuate the purposes of the Act. Having found the Association discharged Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage for engaging in concerted activities protected by the Act, I recommend that the Association be directed to offer Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage reinstatement to their former positions, if necessary terminating any employees hired to replace them,²² and to make them whole for any losses in wages or benefits they suffered by virtue of the discrimination against them, with the amounts due calculated in the manner set out in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and interest thereon computed in accordance with the formula set out in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

On the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I recommend the issuance of the following:

ORDER²³

The Respondent, San Diego County Association for the Retarded, San Diego, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from disciplining its employees for engaging in a strike for the purpose of securing satisfactory resolution of their work-related grievances.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer to Robert Acosta, James Dunkin, David Gilmore, Aiko Hinojosa, Karen Pickell, Therese Sullivan, Genvieve West, and Warren Werwage reinstatement to their former positions, if necessary terminating any employees hired or assigned to replace them in those positions.

(b) Make whole Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage in the manner set out in "The Remedy" section of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and any other records neces-

²² I reject the Association's contention the eight are barred from reinstatement by their participation in the preparation and circulation to parents of the students and the public of a letter on April 28, 1980, wherein they appealed to the parents and the public for support in their effort to resolve the work-related grievances which led to their strike and their discharges. Appeals by strikers to third parties for support concerning issues related to their dispute with their employer do not deprive strikers of reinstatement rights under the Act.

²³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

sary to analyze and determine the amounts due to Acosta, Dunkin, Gilmore, Hinojosa, Pickell, Sullivan, West, and Werwage under the terms of this Order.

(d) Post at its premises in San Diego, California, copies of the attached notice marked "Appendix."²⁴ Copies of said notice, on forms provided by the Regional Director

²⁴ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

for Region 21, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.